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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1977

## No. 77-1478

PACIFIC GAS AND ELECTRIC COMPANY
and JAMES C. CARROLL,
*Petitioners,*

vs.

DONALD WIDENER,
*Respondent.*

## REPLY BRIEF OF PETITIONERS

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## REPLY BRIEF OF PETITIONERS

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Pursuant to Rule 24 Subdivisions 4 and 5, U.S.S.C. Rules, Petitioners respectfully submit this reply brief in response to the arguments in Respondent's brief that the Petition should be denied because the case is not appropriate for review by this Court.

The clarity of the record in this case is apparent from the fact that no essential fact relied upon by Petitioners is questioned by the Respondent. The only disagreement even suggested relates to Carroll's reliability. (Response to Petition at 4-5.) Analysis reveals that, even here, the parties are in agreement.

Petitioners rely on the fact that everyone at PGandE trusted Carroll. Respondent relies upon evidence which would permit an inference, according to the Court of Appeal,

that they should not have. These two propositions are not contradictory. These differing views highlight the objective nature of the test applied by the Court of Appeal.

Not surprisingly, the parties attach different legal significance to the established facts. For example, Widener asserts that reckless disregard of the truth can be inferred from the admitted fact that no PGandE employee involved saw the film before Carroll mailed his letter. Petitioners assert that the fact, also admitted, that they attempted to obtain a copy of the film before the letter was written and were denied access to it provides evidence of their good faith attempt to write an accurate letter.

Similarly, the opposition to the Petition stresses Petitioners' desire to prevent further showings of the film "Powers That Be." (Response to Petition at 3-4.) This, however, was the logical outgrowth of their belief that the film was distorted and misrepresentative. It is difficult to imagine how a desire to prevent dissemination of a misleading film provides evidence of knowing falsity or reckless disregard of the truth.

The important point that emerges is that the essential facts in this record are undisputed. The critical question squarely presented to this Court is what legal significance may permissibly be attached to these facts in a First Amendment libel case.

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Widener begins his argument against the Petition on the basis of a narrow reading of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), suggesting that interlocutory judgments involving the "media" are somehow more final than similar interlocutory judgments involving private parties and non-media corporations. Finality of a judgment is not dependent on the presence or absence of a "media" defendant. Rather, the operative concern should be the importance of the values protected by the First Amendment, whose protection is equally available to "media" and non-



media defendants. *First National Bank of Boston* v. *Bellotti*, 46 U.S.L.W. 4371 (April 26, 1978) (76-1172).

It remains undisputed that the Court of Appeal's opinion establishes with finality the First Amendment standards for the retrial of this case and for any other case relying on the *Widener* opinion. This case will, therefore, have a substantial impact on fundamentally important federal policies related to the First Amendment.[1]

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Widener does not contest that the flexibility permitted under this Court's previous decisions to allow the evidentiary boundaries of reckless disregard of the truth to be "marked out through case-by-case adjudication" has resulted in varying degrees of First Amendment protection from trial court to trial court across the country. Rather, Widener simply suggests that the inconsistency in this important constitutional area is a necessary concomitant of the common law process. (Response to Petition at 7.)

The goal of the common law process has been and should be to achieve uniformity while preserving the flexibility to deal with new factual situations. One disadvantage of the common law, however, is that it only works retrospectively on factual situations that have already occurred. This inevitably has a chilling effect on free expression.

In this area there has been enough lower court experience to provide a basis at least to decide whether reckless disregard of the truth is "only negligence raised to a higher power" as well as broader questions of relevance and weight of evidence. There is no need to continue the patterns of inconsistency that have developed in the application of the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

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[1]Widener's reliance on *National Broadcasting Co.* v. *Niemi, cert. denied*, 46 U.S.L.W. 3659 (April 24, 1978) for a contrary position is misplaced since even Mr. Justice Rehnquist, who dissented in *Cox Broadcasting Corp.* v. *Cohn*, was "prepared to assume that the *Niemi* case represented a "final judgment" under the *Cox* holding. *National Broadcasting Co. v. Niemi*, 98 S.Ct. 705 (1978) (Denial of Application for Stay).

To address these evidentiary standards at this particular time is especially appropriate since the question of alternative sources of evidence available to prove reckless disregard will be relevant, at least indirectly, to the discovery issues presented in *Herbert* v. *Lando, cert. granted,* 46 U.S.L.W. 3577 (March 20, 1978) (No. 77-1105).

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Widener suggests that all of the decisions discussing the appropriate function of an appellate court in reviewing a defamation judgment under the First Amendment can be harmonized. (Response to Petition at 7.) The cases do not permit such a simple resolution of the conflict in the circuits. Even more importantly, Widener cannot suggest that the appropriate function of a reviewing court is not a matter of extreme importance, or that clarification by this Court would not be of substantial assistance to the lower courts in both the federal and state systems.

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Finally, Widener contends that the "main point" of the Carroll letter related to secret taping, and that it is now admitted that no "secret taping" took place. He does not address the question of whether the difference between the admittedly false statement and the actual truth of misrepresentation is sufficient to warrant the imposition of liability consistent with the First Amendment. This is the question which was reserved in *New York Times Co.* v. *Sullivan,* and the question which is squarely posed by this record.



## CONCLUSION

It is true that the litigation in this case and in many other First Amendment libel cases has been protracted. However, this impediment to the administration of justice can best be dealt with not by now rushing to judgment in this particular case, but by developing clear guidelines upon which all parties can rely, both in this action and in other defamation actions brought under the First Amendment. This case and other First Amendment libel actions will ultimately be resolved more expeditiously if the proper role for "evidence of negligence, of motive and of intent," whether cumulated or not, is addressed by this Court.

Respectfully submitted,

/s/ JOHN E. CARNE

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May 5, 1978